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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 21

THOMAS MARTINO, PETITIONER,

vs.

MICHIGAN WINDOW CLEANING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 17, 1945.

CERTIORARI GRANTED JUNE 18, 1945.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 13, 1945.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 3449

THOMAS MARTINO, Plaintiff,

v.

MICHIGAN WINDOW CLEANING COMPANY, a Michigan corporation, Defendant

AMENDED COMPLAINT—Filed September 24, 1942

I

The plaintiff brings this action for himself and for all other persons similarly situated for the purpose of enjoining the defendant from violating the provisions of Sec. 15(1) (a), 15(a) (2) and 15(a) (3) of the Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 20 et seq., hereinafter call The Act, by virtue of Sec. 16(b) and Sec. 17 of the Act and for damages, liquidated damages, attorney fees, and costs.

II

Jurisdiction of this action is conferred upon the Court by Sections 16(b) and 17 of The Act.

III

The defendant is, and at all times herein mentioned was, a corporation organized under and by virtue of the laws of the State of Michigan, having its office and principal place of business at 629 W. Larned Street, in the city of Detroit, Wayne County, Michigan, engaged in the business of wash-
[fol. 2] ing windows, painting, and similar maintenance work on buildings in which interstate commerce is carried on and conducted.

IV

The defendant has at all times herein mentioned employed upwards of twenty (20) men. The plaintiff and all other persons similarly situated were employed by the

defendant in occupations necessary to the production of goods in interstate commerce that he and the other employes, as aforesaid, washed windows on buildings in which the tenants and or occupants were engaged in producing goods for interstate commerce.

V

The plaintiff appears herein for himself, as a former employe of the defendant, and also in a representative capacity for all other persons similarly situated, as authorized by Sec. 16(b) of the Act and as further authorized by Rule No. 23 of the Rules of Civil Procedure. Plaintiff especially appears herein for the following other persons in addition to himself: Albert Schrott, Waldo L. Dowell, John Hodas, H. O. Peters, Louis Vamous, John Pfeiffer, Ted Normile, Frank Ellin, Loren Hayes, Kenneth Theisen, Arthur Haussmann, Bill Milligan, Charles Liges, Spencer Bing, O. Lyons, R. Wallen, Clair Otterson, Anthony Sacco, Christopher Sanders, E. Sanders, George Soller, Wayne McLaughlin, Homer Wallen.

VI

Subsequent to October 24, 1939, the defendant required the plaintiff and other employes similarly situated to work in excess of forty-two (42) hours per week, and subsequent to October 24, 1940 the defendant required the plaintiff and other employes similarly situated to work in excess of forty (40) hours per week, and at no time did the defendant pay the plaintiff and other employes similarly situated time and a half for such work, save only for work in excess of forty-four (44) hours per week, contrary to the Act, and to the [fol. 3] great harm and injury of the plaintiff and all other employes similarly situated.

VII

The full particulars as to hours, dates, rates, etc., are not at the command of the plaintiff, but are within the control of the defendant, and when the defendant has satisfactorily complied with the requirements of the interrogatories hereto annexed, the plaintiff will ask leave of the Court to file an Amended Complaint outlining in greater particularity the claims of the plaintiff and other employes.

VIII

The defendant corporation has sought by various means to bring influence to bear on its employes not to institute this suit, and that such pressure amounts to coercion and intimidation, and the employes have good reason to fear that they will suffer discrimination at the hands of the employer as a result of their action in participating in this suit; and that such coercive measures will continue unless the employer is enjoined therefrom by the injunction of this Honorable Court.

IX

The plaintiff, in his own behalf, and in behalf of other employes similarly situated, therefore prays:

A. That the defendant may be enjoined from failing to pay time and a half for all work performed in interstate commerce in excess of forty hours per week; and that such injunctive relief may be both temporary, pending the trial of this cause, and thereafter permanent.

B. That the defendant may be enjoined from intimidating, threatening, or otherwise coercing the various employes by reason of their participation in this action.

C. That judgment may be entered in favor of the plaintiff and other employes so situated for the amount of unpaid wages for overtime, according to the Act, together with a like sum as liquidated damages, together with rea- [fol. 4] sonable costs and attorneys fees. Wherefor the plaintiff will ever pray, etc.

X

Interrogatories

1. Give the hourly wage rates of such employes, past and present, as set forth in Interrogatory 1, showing increases or decreases in such rates, as the cases may be. Answer:

2. Give the various and several jobs on which each employe worked subsequent to October 24, 1939, to the present date. Give the name of the establishment where work was

performed, and the nature of the work engaged in by such establishment. Answer:

3. Give the hours of labor performed by each such employe, by the day, from October 24, 1939, to the present date. Answer:

4. Give the work week under which the defendant corporation operates. Answer:

(Signed) Thomas Martino.

In United States District Court

Answer to Amended Complaint and Defenses of Defendant—Filed September 29, 1942

Now comes the Michigan Window Cleaning Company, a Michigan Corporation, defendant herein, answering the Amended Complaint of the plaintiff, and says:

I

Answering paragraph I, this defendant denies on information and belief that the plaintiff has any authority to bring the action for any person other than himself, and [fol. 5] denies that there is any occasion for any relief under the statutes relied upon by the plaintiff; defendant states the truth to be that the statutes in question have no bearing upon the business of the defendant, and are not applicable.

II

Defendant denies that the Court has jurisdiction in said cause, because plaintiff has no cause of action against this defendant by reason of the matters set forth in this answer and defenses filed herewith.

III

Defendant admits allegations in the third paragraph, except that portion which seeks to imply that the defendant is engaged in interstate commerce by reason of the work done by the defendant, which is hereby denied, and in support of its denial, defendant will show that if is not engaged in interstate commerce within the meaning of the Act.

IV

Defendant denies the allegations contained in the fourth paragraph.

V

Defendant, on information and belief, denies the allegations contained in said fifth paragraph.

VI

Defendant denies the allegations therein contained, and further states that the provisions of the Act relied upon by plaintiff have no relation to the situation of the defendant and its employees.

VII

Answering paragraph VII, this defendant denies the allegations therein contained, and in support of its denial will show that the plaintiff has full knowledge of all the hours he worked for the defendant, or should have such [fol. 6] knowledge without access to any records of the defendant. And this defendant denies that the so-called interrogatories have any place in said complaint or are a proper part thereof; that the insertion of the so-called interrogatories as a part of said complaint is not in compliance with the Rules of Civil Procedure for the District Courts of the United States, and the defendant demands that said interrogatories be stricken.

VIII

Defendant denies the allegations of paragraph VIII, and states the same to be without foundation in favor or truth, and says that said allegations are made for the purpose of attempting to artificially create an issue which does not exist; that plaintiff is not a proper person to seek redress under the section of the statute relied upon; that said plaintiff is not an employee of said defendant, and was not discharged by the defendant; that the statutes relied upon have no relation to the business of the defendant.

First Defense

The so-called interrogatories contained in said complaint are not properly a part of the pleading, and are not in compliance with Rule 33 of the Rules of Civil Procedure

for the District Courts of the United States, and defendant prays that said interrogatories be stricken from the complaint.

Second Defense

1. The business of the defendant does not come within the meaning of the Fair Labor Standards Act of 1938, being an Act passed by the Congress of the United States.

2. The defendant is not engaged in interstate commerce within the meaning of the Act, and its employees are not engaged in any of the operations defined in said Act.

Third Defense

That defendant is informed and believes it to be true, that plaintiff does not represent any employees of the de- [fol. 7] fendant, but has brought said action in an attempt to induce employees of defendant to join with him; that as a former employee of defendant, said plaintiff is not entitled to any injunctive relief and is not authorized to seek such relief on behalf of any of defendant's employees.

Fourth Defense

1. That it is necessary for a proper determination of the issues raised that the Detroit Window Cleaners' Union Local 139, B. S. E. L. U. be made a party defendant in said cause.

2. That said plaintiff is a business agent for said Union, and is an agent thereof.

3. That said Union is a voluntary association, composed of members engaged in the work of window cleaning and kindred occupation.

4. That said Union has for a number of years represented its members in negotiations with the defendant and other window cleaning companies, and as a result of such negotiations has executed contracts with the defendant and other employers.

5. That successive contracts have been executed between the Union and this defendant over a period of years, the last one having been signed on or about July 16, 1941, copy of which is in the possession of said Union and the plaintiff, to which reference is prayed as if particularly herein set forth and made a part hereof.

6. That said contract provides among other things that all employees "shall be employed through the office of the Union," and defendant is required to hire the employees sent by the Union; that the Union engages in fact in the capacity of an employment agency for its members; that the defendant may not hire any other than persons but "journeymen Window Cleaners, members of this (Union) organization."

7. That the plaintiff, the Union, and Union members know, knew, or should have known the provisions of the [fol. 8] contracts executed between the Union and the defendant and voluntarily submitted themselves for work thereunder; that neither the plaintiff, Union, nor the defendant at any time considered or believed that the Fair Labor Standards Act of 1938 had any bearing upon the work or type of work performed by the defendant or the business engaged in by it, and all the parties proceeded upon the understanding that the provisions of said Act did not apply.

8. That the present suit of the plaintiff may be an attempt on the part of the Union to circumvent the agreement entered into with the defendant, and it is absolutely essential that said Union be made a party defendant in order to permit the defendant to properly present its defenses and meet the issues involved in said suit.

9. That the action of the plaintiff and the Union amounts to a conspiracy to extort money from the defendant, contrary to the law; that if it should be determined that the provisions of the Fair Labor Standards Act do apply to the defendant, then said Union is a necessary party defendant by reason of its participation and action in executing the contract between it and the defendant, and should be held equally liable for any damages assessed.

10. That the contract between the Union and defendant is not an individual contract of labor with employees, but is an "Agreement between the Detroit Window Cleaners' Union, Local No. 139 B. S. E. L. U., affiliated with A.F.L. and the Individual Employers of Detroit and Michigan;" that the contract does not establish minimum hours which must be complied with, but does seek to establish maximum hours of work for each day and week, and overtime pay in excess thereof; that such work is voluntary on the part of each member; that employees may work less hours than the maximum.

Fifth Defense

That it would be inequitable and scandalous to permit the Union to penalize the defendant for having acted in [fol. 9] good faith with the Union in the execution of the contract herein referred to.

Sixth Defense

That either the Union entered into the agreement with the defendant in fairness, with the mutual understanding that the defendant was engaged in intrastate commerce and that the Fair Labor Standards Act of 1938 did not apply to the work of the defendant, or the Union entered into such agreement with the concealed intent and purpose of victimizing the defendant through a deliberate act on the part of the Union in executing said agreement, and then later proceed in the manner described in the complaint filed herein.

Seventh Defense

None of the employees of the defendant has made any demand upon the defendant at any time for any payment under said Act.

Eighth Defense

That the Union is a necessary party defendant because it was instrumental in negotiating said contract on behalf of its members; and if the provisions of said contract for hours and wages are found to be contrary to the provisions of the Act, and the Act found to be applicable to the defendant, then said Union is equally responsible with the defendant in the execution of said contract, and should be found equally liable for any damages.

Wherefore defendant demands:

(1) That the Court order the Detroit Window Cleaners' Union Local No. 139, B. S. E. L. U. to be made a party defendant to respond to the complaint and to this answer and defenses.

(2) That the Court discharge the defendant from all liability in the premises.

[fol. 10] (3) That the Court find that the provisions of the Fair Labor Standards Act of 1938 does not apply to the defendant.

(4) That if the Court should find that the provisions of said Act do apply, then damages to be assessed against the Union.

(5) That the Court award to the defendant its costs and attorneys' fees.

Michigan Window Cleaning Company, by J. Bomze, Defendant; Leo A. Mandell, Attorney for Defendant; Davidow & Davidow, Attorneys of Counsel for Defendant, by Larry S. Davidow.

In United States District Court

Stipulation of Facts and Stipulation of Issues of Facts—Filed November 23, 1942

The following constitutes a joint statement, made by the parties to this cause through their respective counsels, of the admitted facts and of issues of fact. The inclusion of any stipulated fact or issue of fact does not constitute an acknowledgment of relevancy or materiality of such fact or issue.

1. Stipulation of Facts

A. That the parties plaintiff were employed by the defendant in excess of the normal work week prescribed by the Act but were not paid time and a half for hours between 41 and 44, inclusive.

B. That the parties plaintiff were employed as window washers and cleaners by defendant corporation, and were [fol. 11] assigned by the defendant to the cleaning of windows on various buildings whose occupants were under contract with the defendant corporation for the performance of such window washing.

C. That among such occupants were companies definitely engaged in the production of goods in interstate commerce, such as various units of the General Motors Corporation.

D. That during an undetermined number of weeks the various parties plaintiff were employed in such occupations on such buildings in which such goods were produced in interstate commerce.

E. The union, acting for and on behalf of the plaintiffs, made an agreement with the defendant and renewed it for a number of years preceding and including 1939, up to and including the time of commencement of this suit.

F. The payment of compensation by defendant to its employees, including the plaintiffs in this suit, was in accordance with the agreement between the plaintiff and the union on one hand, and the defendant on the other.

G. The plaintiffs are members of Local Union 139, Detroit Window Cleaners' Union and were such members for a number of years previous to 1939 and up to and including the date hereof.

H. The agreement referred to and those agreements that preceded it, were freely, voluntarily and in good faith entered into between the union acting on behalf of its members and authorized so to do, and the defendant employer.

I. All the agreements executed between the union on behalf of its members and the defendant from the time their relations first began were fully observed by the defendant.

J. The agreement between the parties in existence at the time suit was started, and its predecessors, provided for a closed shop.

[fol. 12] K. Attached is a true copy of the agreement in existence at the time suit was started. The agreements previously in existence were substantially in the same form as the one attached hereto.

2. Issues of Fact

A. The precise number of work weeks in which the parties plaintiff were partially or wholly engaged in such occupations necessary to the production of goods in interstate commerce.

B. A breakdown thereof by employe, work week, and number of hours per work week per employe.

C. That Local 139 Detroit Window Cleaners' Union is a bona fide labor union within the meaning of the Act and that it properly, lawfully and completely represented its members, including the plaintiffs, in the negotiations that were carried on from time to time with the defendant and

which negotiations resulted in the various agreements that were originally made and subsequently renewed from year to year up to and including the time of institution of this suit.

D. The Local Union acting for and on behalf of the plaintiffs and its other members, had the use and benefit of the services of a competent lawyer, particularly skilled in the knowledge of the law affecting labor unions during all the negotiations over the period referred to in the previous statements of fact.

E. The plaintiffs knowingly, willingly and deliberately accepted the terms and conditions of the various agreements from time to time renewed and particularly from or after the passage of the so-called Wage-Hours Act up to the time the present suit was instituted.

F. The attempt to enforce the provisions of the Wage-Hours Act in the relations between the plaintiffs and the union on one hand, and the defendant on the other, would in effect be a violation and repudiation of the wages feature [fol. 13] of the agreement and its predecessors heretofore entered into between the parties concerned.

G. The union and its members agreed with defendant and other window cleaning companies that the work done by the employers was not embraced within the terms, "interstate commerce."

H. The renewal of the agreements following the passage of the Wage-Hours Act was based upon mutual agreement that the Wage-Hours Act did not apply to the employers, such as the defendant in this case.

I. No suggestion of violation of the Wage-Hours Act on the part of defendant or other employers claimed by plaintiffs until after the decision by the United States Supreme Court involving the New York-Loft case.

J. Until the present suit was instituted, plaintiffs and the union on one hand, and defendant and the other employers on the other, both acted upon the opinion and assumption that the Wage-Hours Act did not apply to the nature of the work done by the defendant and other employers.

K. The operation of washing or cleaning windows is not a necessary operation on buildings having anything to do

with the production activities carried on within those buildings; the washing of windows in no way contributes to or affect production activities that may be carried on in the buildings.

L. The defendant purchases all of its supplies in the City of Detroit and performs all of its operations within the State of Michigan and it does not cater to, service or supply the needs of anyone outside of the State of Michigan.

Léon A. Cousens, Attorney for Plaintiff; Davidow & Davidow, by Larry S. Davidow, of Counsel for Defendant.

Dated at Detroit, Michigan, November 23, 1942.

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed November 23, 1942

Now comes the above named plaintiff, for himself and for other persons similarly situated, by his attorney, Leon A. Cousens, and respectfully moves this Honorable Court that summary judgment be entered against the said defendant on the pleadings, and in support whereof the plaintiff says:

1. It is admitted by the pleadings that the plaintiff and other employes worked in excess of the hours prescribed by the Fair Labor Standards Act of 1938, to-wit, between 41 and 44 inclusive, but were not paid time and one-half the regular rate, as required by the Act.

2. The pleadings further admit that the plaintiffs are employed as window cleaners and that a substantial portion of their work was performed on buildings whose occupants were engaged in the production of goods in interstate commerce.

3. There are no relevant or material questions of fact on which testimony need be taken, and that a trial is therefore not necessary.

4. That the pleadings have raised certain issues of law which, if decided favorably to the plaintiffs' contention, must result in judgment against the defendant, notwith-

standing that (for the purposes of this motion) all of the defenses set up in the defendant's answer, are taken as true.

5. The issues of law presented by the pleadings are as follows:

First: Whether a former employe may lawfully bring action against his former employer for wages and liquidated damages under the Fair Labor Standards Act of 1938, or whether such action is limited to present employes.

[fol. 15] Second: Whether window cleaning is a necessary maintenance operation on buildings.

Third: Whether employes of an outside contractor, engaged in the cleaning of windows on buildings in which goods in interstate commerce are produced, are *themselves* engaged in an occupation "necessary to the production of goods in interstate commerce" within the meaning of the Act.

Fourth: Whether an individual employe's right to bring action under Section 16 (b) of the Act is impaired by a collective bargaining contract entered into between the union to which the individual employe belongs and the employer, whereby neither the employer nor the union, nor its members had any contemplation that the employment involved comes under the Act, and whereby the parties provided in collective contract that time and one-half shall begin not at 40 hours, as provided by law, but at 44 hours.

Fifth: Whether the right of the plaintiff to bring this action is impaired by the fact that no demand for payment under the Act was made prior to the institution of suit.

Wherefor-, plaintiff prays that summary judgment on the pleadings be entered against the defendant and in favor of himself and all other persons similarly situated.

This motion is based on the records and files of this Court and cause and on the motion of Leon A. Cousens, hereto attached and made a part hereof.

Leon A. Cousens, Attorney for Plaintiffs.

[fol. 16] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed February 3, 1943

—Plaintiff has made a motion for summary judgment based on stipulation of facts and stipulation of issues of facts. Plaintiff is an employee of defendant which is engaged in washing windows of buildings in which interstate commerce was carried on or in which goods were produced for interstate commerce. He and others claim that they come under the Fair Labor Standards Act because they helped in the production of goods sold in interstate commerce and are entitled to time and one-half for work in excess of 42 hours, commencing October 24th, 1939 and ending October 24th, 1940. Defendant makes its contracts direct with the occupants of the particular place where the windows are to be washed and plaintiff claims the right to recover under Kirschbaum v. Walling, decided June 1st, 1942 and appearing in volume 316 U. S. Reports at 517.

Section 13 of the Fair Labor Standards Act provides:

> "(a) The provisions of sections 6 and 7 shall not apply to * * * (2) any employes engaged in any retail or service establishment the great part of whose selling or servicing is in intrastate commerce."

In the Kirschbaum case the court held that where the defendant company rented building space to clothing manufacturers who obviously were engaged in interstate commerce, furnishing with the building, plummers, electricians, elevators operators and porters, all of these came under the Fair Labor Standards Act just as though the firm so operating in interstate commerce had engaged them directly. In the Kirschbaum case, however, Justice Frankfurter disposes of the "service establishment" feature of defendant's claim by stating:

> "Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce."

[fol. 17] It is well to note, however, that in the Court of Appeals decision of this same case, 124 Fed. (2nd) 572-3 the

court in suggesting illustrations of what Congress meant by "service establishments" specifically mentioned—

> "barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops."

Evidently, therefore that court with a broad and liberal interpretation of the Fair Labor Act in mind and desirous of accomplishing the objective of Congress on as broad a basis as possible, included "laundries" among those exemptions. Of course the court evidently meant "clothes laundries" but is there a great deal of difference between the ultimate functions of a laundry for clothes and a laundry for windows? What the Court of Appeals said, however, in quoting the foregoing illustrations from another decision is only dictum, but we believe there is a distinction between the facts in the Kirschbaum case and the facts here. In the Kirschbaum case the employees were all part of and went with the rental of the building. Kirschbaum wasn't furnishing "service" as such. But here the defendant was furnishing window washing and this in our opinion makes it obviously a service.

Evidently Congress anticipated the possibility of purely service establishments rendering service to those engaged in interstate commerce and those not so engaged. Otherwise why did it so word the exemption as to exclude those service establishments where the greater part of their service was done in intrastate commerce?

Therefore, this court believes that the Kirschbaum case is not applicable; that there is a difference basicly generating from the facts and that before plaintiff would be entitled to recover he would have to show that the greater part of the "servicing" engaged in by the employer is not in intrastate commerce. It may be that the burden of proof is on defendant but in any event this court must know whether defendant was engaged mostly in intrastate commerce or interstate commerce. In addition it may be well [fol. 18] for the parties to also show the percentage of the several work weeks where the employees participated in interstate commerce because it is recognized that an employee may be engaged in intrastate commerce one week and not the next.

The other question involved relates to the contract that was entered into by the union, of which the plaintiff is a

member, and defendant. The contract was obviously entered into under the supposition that the Fair Labor Standards Act did not apply to this species of labor. We do not decide that question. Our inclination is, however, that if a mistake was made in the legal interpretation of a statute aimed at the health and general welfare of anyone engaged in manual labor, that this court ought to correct it if possible and that under the decisions it would be our duty to so correct the status as to provide time and one-half for overtime in the event plaintiff is able to show that defendant is engaged for the greater part in furnishing its service to firms engaged in interstate commerce or in the production of goods for interstate commerce.

The motion for summary judgment is therefore denied and proofs will be taken unless the facts can be further stipulated.

Frank A. Picard, United States District Judge.

Dated: February 3rd, 1943.

IN UNITED STATES DISTRICT COURT

ADDITIONAL STIPULATION OF FACTS—Filed May 6, 1943

It is hereby stipulated and agreed by and between the parties to this cause, by and through their respective attorneys, that the following facts exist in addition to those previously stipulated between the parties:

[fol. 19] A. As a matter of fact, during the period here involved, the greater portion of the work done by the defendant corporation and by the parties plaintiff under direction of the defendant corporation, was for customers who were engaged in interstate commerce and most of whose employes were engaged in interstate commerce.

B. As a matter of fact, during the period here involved, the greater portion of the work done by the defendant corporation and by the parties plaintiff under the direction of the defendant corporation was for customers who were engaged in the production of goods for interstate commerce, and most of whose employes were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce.

C. As a matter of fact, the foregoing is true both as to the volume of work done by the defendant corporation, in terms of money paid to the defendant corporation by its customers and as to the number of customers engaged in interstate commerce or in the production of goods for interstate commerce, as against those customers of the defendant not so engaged.

D. As a matter of fact, the work done by the defendant corporation on such buildings whose occupants were engaged in interstate commerce or in the production of goods for interstate commerce, was performed within the confines of the State of Michigan.

Leon A. Cousens, Attorney for Plaintiffs; Davidow and Davidow, by Larry S. Davidow, of Counsel for Defendant.

Dated at Detroit, Michigan, May 3, 1943.

[fol. 20] In United States District Court

Renewal of Motion for Summary Judgment—Filed June 15, 1943

To the Court:

The plaintiff renews the previous motion for summary judgment which was heretofore decided by this Court.

This motion is based on the records, pleadings, and the Stipulation of Fact, and in particular on the Further Stipulation of Facts recently filed in this Court and cause.

This motion is submitted on briefs, in accordance with instructions of the Court.

Leon A. Cousens, Attorney for Plaintiff.

In United States District Court

Opinion of the Court—Filed July 14, 1943

This opinion must be read in conjunction with the opinion rendered in the same matter February 3, 1943, in response to plaintiff's petition for a summary judgment in denying which the Court expressed itself as follows:

"Therefore, this Court believes that the Kirschbaum case is not applicable; that there is a difference basic-ly

generating from the facts and that before plaintiff would be entitled to recover he would have to show that the greater part of the 'servicing' engaged in by the employer is not in intrastate commerce. It may be that the burden of proof is on defendant but in any event this Court must know whether defendant was engaged mostly in intrastate commerce or interstate commerce."

[fol. 21] We quote the above because of the evident misunderstanding of plaintiff as to its interpretation. The important part of that paragraph to this Court is contained in the words:

"*But in any event* this Court must know whether defendant was engaged mostly in intrastate commerce or interstate commerce."

Admittedly the question here turns upon the interpretation to be given that part of Section 13 of the Fair Labor Standards Act, which is as follows:

"(a) The provisions of sections 6 and 7 shall not apply to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

We decided in our original opinion that defendant was a service establishment, so that question is out of the way. Obviously then in conformity with the law above if more than 50 per cent of its business was interstate commerce, then its employees were under the Act. But when this Court rendered its February 3, 1943 opinion it didn't know whether defendant actually sent its men out of the state to service customers; whether the greater percent of its customers were those who had their business here in Michigan but who were engaged in interstate commerce; or whether its business was a combination of the two. This Court did not bind itself, as intimated by plaintiff's counsel in his briefs, to any conclusions, simply because it was seeking facts. If more than 50 per cent of defendant's business was intrastate commerce, then the answer would have been simple; but because, as the facts stipulate, more than 50 per cent of its business was devoted to servicing customers engaged in interstate commerce or buildings where

the occupants thereof were engaged in interstate commerce, the question was entirely different and presented this Court with necessity for further deliberation and research.

The question here then is:

> "Is a service establishment engaged in interstate commerce because its employees (who do not go out [fol. 22] of the state to work) do render service to customers who are admittedly engaged in interstate commerce, which service indirectly aids those customers 'in the production of' their 'goods for interstate commerce' and which service amounts to more than 50 per cent of the service establishment's business?"

If the position contended for by plaintiff is a correct statement of the law, then a comparatively few people, service establishments or otherwise, would not be included as subject to the Fair Labor Standards Act. If rendering the service of washing windows in a building for occupants who are engaged in interstate commerce automatically makes the window washers engaged in interstate commerce it would be difficult under our complex economical and commercial life to conceive a situation where any workman would not come under the Act. From this conclusion it would be but another step to hold that a window washing company that served a hotel would have to find out from week to week what the occupants of the several hotel rooms did for a living, whom they were representing if their firms were engaged in interstate commerce. Soon the law's applicability would be "reductio ad absurdum."

And this was not the decision in Kirschbaum v. Walling, 316 U. S. Reports 517. There the window washers, janitors and elevator operators were part of the establishment that was rented to the company engaged in interstate commerce. But, on the other hand, we do believe that the decision in this action is governed by the rule laid down in Lonas v. National Linen Service Corporation decided June 22, 1943, by our own Sixth Circuit Court of Appeals, not yet in pamphlet form. There on 20 per cent of defendant business its employees actually went outside the state of its domicile, while 60 per cent of its service, although rendered within the state, was rendered to industrial firms. We believe we can assume that sufficient of those industrial concerns were engaged in interstate commerce to bring the

facts analogous to those in the case at bar. In fact, this claim was made by the administrator in the Lonas (supra) case, but the Court held that defendant's employees did not come under the act and we so hold here.

[fol. 23] May we not add that in rendering this opinion we are aware of the difference between the interpretative bulletins and instructions of the administrator evidenced by briefs of the respective parties as directed to our attention by plaintiff. But even if the difference is as controlling as claimed by plaintiff and while this Court has often recognized that the interpretations of the administrator are entitled to "great weight," U. S. v. American Trucking Associations, 310 U. S. 534, those interpretative bulletins are not the law. As stated by Judge Simons in Lonas v. National Linen Service Corporation, supra:

> "The administrator * * * contends that the exemptions in paragraph 13 (a) (2) are limited to establishments retail in character whether they sell goods or services. This view is based upon what he conceives to be the implications to be drawn from the legislative history of the Act and the grammatical construction of the exemption section. Since the related terms are coupled in the same sentence and are used in the disjunctive with the terms 'retail' and 'service' both modifying the word 'establishment' they refer to employers who deal directly with private consumers as distinguished from commercial and industrial customers. In other words, the service establishment exemption extends only to those establishments having the characteristic of retail stores, and the defendant's business is not a retail service establishment because 60 percent of its customers are industrial or business concerns.
>
> We find no support for this interpretation in the language of the exemption section. Two enterprises are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be an intra-state commerce, and in the case of a service establishment, the greater part of its servicing must be in intra-state commerce. Had the Congress intended to limit the exemption of service establish-

ments to those which perform services for private in-
[fol. 24] dividuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose."

A judgment in accordance with this opinion will be presented for our signature by defendant.

Frank A. Picard, United States District Judge.

Dated: July 14, 1943.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND FINDINGS AT LAW—Filed August 30, 1943

At a session of said Court held in the Federal Building in the City of Detroit, Michigan, this 30th day of August, 1943.

Present: Honorable Frank A. Picard, United States District Judge.

This cause having come on to be heard upon the pleadings and stipulations of fact and on the petition of plaintiff for summary judgment, and upon argument of counsel in open court, followed by the submission of briefs, and the Court being fully advised in the premises, finds:

First: that the existence of a trade union contract between the defendant employer and the union to which plaintiffs belong, which contract was entered into and fully consummated in the mutual belief that the provisions of the Fair Labor Standards Act do not apply to the employees, can constitute no bar to the right of the employees to recover under Section 16 (b) of the Act if, as a matter of fact and as a matter of law, the Fair Labor Standards Act does apply.

Second: The right of employees to bring action under Section 16 (b) of the Fair Labor Standards Act cannot be
[fol. 25] waived by the employees since such right is given them not merely for their private benefit, but in order to effectuate a public policy. Consequently, the fact that the trade union contract under which the employees worked provided for standards different than those required by the Act, would constitute no defense to an employee suit under the Act if, as a matter of law, the employees were entitled to the benefits of the Act.

Third: The fact that some of the employees were no longer employed by defendant at the time suit was commenced would have no effect on their right to sue for such wages, if any, as they might be entitled to have received under the Act during their period of employment, if the Act did apply.

Fourth: It is not necessary for the proper determination of the issues raised herein that the Detroit Window Cleaners' Union be made a party to the suit.

Fifth: The right of plaintiffs to recover, if any, is not affected by a failure to make demand upon the defendant for payment under the Act, prior to the commencement of suit.

Sixth: The Court finds, however, that the defendant herein is a service establishment, the greater portion of whose servicing is in intrastate commerce, and that the defendant comes within the exemption covered by Section 13 (a) (2) of the Fair Labor Standards Act.

Therefore, it is ordered, adjudged and decreed that the plaintiffs recover nothing by reason of this action and that the complaint of the plaintiffs be, and the same is hereby dismissed.

Frank A. Picard, District Judge.

Leon A. Cousens, Attorney for Plaintiffs.
Leo Mandell, Attorney for Defendants. Davidow & Davidow, Attorneys of Counsel for Defendants.

[fol. 26] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 25, 1943

Notice is hereby given that Thomas Martino, for himself and for others similarly situated, hereby appeals to the Circuit Court of Appeals for the 6th Judicial Circuit from the final judgment entered in said Court and cause on August 30, 1943.

Leon A. Cousens, Attorney for the Plaintiff.

In United States District Court

Appellant's Statement of Points—Filed October 29, 1943

To the Court:

The plaintiff and appellant will rely on the following points in his appeal of the captioned cause to the Circuit Court of Appeals for the Sixth Circuit.

1. That the District Court erred in holding that the defendant is a "service establishment" within the meaning of Sec. 13 (a) (2) of the Fair Labor Standards Act.

2. That the District Court erred in holding that plaintiff was "engaged in" a service establishment, in the face of stipulations of fact expressly agreeing that, although plaintiff was employed by defendant, the greater part of the work was performed in establishments admittedly engaged in the production of goods for interstate commerce.

3. That the District Court erred in dismissing the complaint because the stipulated facts show that plaintiff was engaged in an occupation necessary to the production of goods for interstate commerce, within the meaning of the Act.

[fol. 27] 4. That the District Court erred in dismissing the complaint on the ground that the defendant is a "service establishment," since the greater part of its servicing was for establishments engaged in the production of goods for interstate commerce, it therefore following that even if defendant was a "service establishment," it was not an exempt service establishment within the meaning of Sec. 13 (a) (2) of the Act.

5. That the Act is a remedial statute and the District Court erred in failing to give a liberal interpretation to coverage, and erred further in giving strict interpretation to an exemption, contrary to the rules of construction of remedial legislation.

Respectfully submitted, Leon A. Cousens, Attorney for Plaintiff and Appellant.

Dated at Detroit, Michigan, October 21st, 1943.

In United States District Court

Appellee's Statement of Points—Filed February 11, 1944

To the Court:

The defendant and appellee will rely on the following points contained in the judgment and findings at law from which a general appeal was filed by appellant:

(1) The District Court erred in finding that the existence of a trade union contract between the defendant employer and the union to which plaintiffs belong, which contract was entered into and fully consummated in the mutual [fol. 28] belief that the provisions of the Fair Labor Standards Act do not apply to the employes, can constitute no bar to the right of the employes to recover under Section 16 (b) of the Act if, as a matter of fact and as a matter of law, the Fair Labor Standards Act does apply.

(2) The District Court erred in finding that the right of employes to bring action under Section 16 (b) of the Fair Labor Standards Act cannot be waived by the employes since such right is given them not merely for their private benefit, but in order to effectuate a public policy. Consequently, the fact that the trade union contract under which the employes worked provided for standards different than those required by the Act, would constitute no defense to an employe suit under the Act if, as a matter of law, the employes were entitled to the benefits of the Act.

(4) The District Court erred in finding that it is not necessary for the proper determination of the issues raised herein that the Detroit Window Cleaners' Union be made a party to the suit.

(5) The District Court erred in finding that the right of plaintiffs to recover, if any, is not affected by a failure to make demand upon the defendant for payment under the Act, prior to the commencement of suit.

Davidow & Davidow, by Larry S. Davidow, Attorneys for Defendant and Appellee.

In United States District Court

Order Extending Time to Perfect Appeal—Filed October 29, 1943

Upon stipulation of counsel, it is ordered that the time allotted for the perfection of the appeal of the above entitled cause to the United States Circuit Court of Appeals for the [fol. 29] sixth Circuit be and is hereby extended fifty days beyond November 4, 1943.

Frank A. Picard, District Judge.

Approved as to form and contents:
Davidow & Davidow, Attorneys for Defendant and Appellee.

In United States District Court

Stipulation of Record on Appeal—Filed October 29, 1943

It is hereby stipulated and agreed by and between the above parties through their respective attorneys, in lieu of Designations of Record, that the following portions of the record in the captioned cause be printed on the appeal to the United States Circuit Court of Appeals for the Sixth Circuit:

1. Amended Complaint;
2. Amended Answer and Defenses of Defendant;
3. Stipulation of Facts and Stipulation of Issues of Fact;
4. Motion for Summary Judgment;
5. Opinion of the Court dated February 3, 1943;
6. Additional Stipulation of Facts;
7. Renewal of Motion for Summary Judgment;
8. Opinion of the Court;
9. Judgment and Findings of Law;
10. Notice of Appeal;
11. Stipulation of Record on Appeal;
12. Statement of Points;
13. Certificate of Court.

[fol. 30] It is further stipulated and agreed that all points and defenses raised by the defendant in its pleadings shall be reviewable.

Leon A. Cousens, Attorney for Plaintiff and Appellant. Davidow & Davidow, Attorneys for Defendant and Appellee.

Dated at Detroit, Michigan, October 14, 1943.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING OF RECORD ON APPEAL—Filed December 17, 1943

Upon reading and filing the stipulation hereto attached, and sufficient reason therefor having been advanced by counsel,

It is ordered that the time for the filing of the record of the lower court is extended to and including February 24, 1944.

Florence E. Allen, Circuit Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION RE COMPARISON OF RECORD—Filed February 17, 1944

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

Leon A. Cousens, Attorney for Appellant. Davidow & Davidow, By Larry S. Davidow, Attorneys for Appellee.

Dated at Detroit, Michigan, this 17th day of February, 1944.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] In the United States Circuit Court of Appeals for the Sixth Circuit

Cause Argued and Submitted

(October 17, 1944—Before: Simons, Hamilton and Martin, J.J.)

This cause is argued by Leon A. Cousens for Appellant and by Larry S. Davidow for Appellee and is submitted to the court.

In United States Circuit Court of Appeals

Judgment—Entered October 18, 1944

Notwithstanding some more or less remote approaches to the present problem in *Kirschbaum* v. *Walling*, 316 U. S. 517, and *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, it is impossible for us to entertain the concept that window cleaning becomes interstate commerce, or is in pursuance of the production of goods for commerce, by the fact that the windows that are cleansed are in the manufacturing establishments of industries engaged in interstate commerce, nor are we able to reject the concept that a window cleaning company is a service establishment, under Sec. 13(a) of the Fair Labor Standards Act, even though the service it renders is not performed on its own premises. We adhere to our rationalization in *Lonas* v. *National Linen Service Corp.*, 136 Fed. (2d) 433. Cert. denied 320 U. S. 785; Wherefore,

The judgment below dismissing the appellant's suit for overtime pay based upon the provisions of the Act, is hereby Affirmed.

[fol. 34] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 35] Supreme Court of the United States

Order Allowing Certiorari—Filed June 18, 1945

The order entered February 26, 1945, denying certiorari herein is vacated and the petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is assigned for argument im-

mediately following No. 1933, Roland Electrical Co. v. Walling.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Daniel D. Carmell. File No. 49,302. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 21. Thomas Martino, Petitioner, vs. Michigan Window Cleaning Company. Petition for a writ of certiorari and exhibit thereto. Filed January 17, 1945. Term No. 21, O. T., 1945.